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Supreme Court, U.S.
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No.09-1366

In the

Supreme Court of the United States

MIHAE LEE and JUNGIL LEE
Petitioners,

v.

WILLIAM J. POLICASTRO, TYRONE M. MCDONNELL, KALEBIC, POLICASTRO & D'AMICO, and KALEBIC, POLICASTRO & MCDONNELL, and CHANG JOON AN, CHANG MI KIM, SEUNG WHAN KIM, AN & KIM REALTY, HY DESIGN REALTY CORP. And MAURIZIO VALENTINO, INC., and JOHN J. IDOUCHI,
Respondent-defendants.

On Petition For A Writ of Certiorari To The Supreme Court of New Jersey

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PETITIONERS' REPLY TO BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE NEW JERSEY USURPED THE JURY'S ROLE AND INVALIDATED THE PETITIONERS' SEVENTH AMENDMENT RIGHTS ON A FACT-ISSUE THAT WAS PROPERLY DETERMINED BY THE TRIAL JURY

The critical issue here is that after all the fact issues were submitted to the jury, without objection from the Respondents, the jury returned with a clear cut 7-0 verdict. During the jury charge, Respondents raised no objection as to the charge that was ultimately submitted and Respondents failed to identify any legal issues pertaining to the jury's deliberative process. Against this background, after the jury's 7-0 verdict, the trial court, usurped the jury's role as the proper fact finder by entered a directed verdict based on its own factual perceptions of the case. The trial court impermissibly invalidated a 7-0 jury verdict, and this is the crux of the "unconstitutional act" being challenged; and this challenge is not "new," contrary to Respondents' suggestion, and it is not being "raised for the first time," as it has been raised since Petitioners' objection to the trial court.

In *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), the United States Supreme Court determined that courts of appeals have authority to direct the entry of judgment with relation to Federal Rule of Civil Procedure 50 when expert testimony was erroneously admitted, and without that expert testimony, there was insufficient evidence to support the jury's verdict.

The principle of this case is that the court premised its decision that the entry of judgment as a matter of law, must be premised on an erroneous *legal* issue. In this case, the trial court went forward and premised its decision on a *factual* issue. The trial court substituted its own fact finding perception instead of relying on the jury's prerogative, after it was submitted to the jury and decided, as is the normal course of legal proceeding. When a court substitutes its own fact perceptions and displaces a jury's verdict, the jury system cannot survive.

The key factual issue in this case is the Side Agreement discussed extensively in Petitioners' opening brief and the fraud induced upon the Petitioners Lees for its creation. This is the linkage of proximate cause that Respondent attempts to derail, but it cannot be disputed that the jury factually found that the defendants acted wrongfully with respect to this issue, resulting in the jury's damages verdict. These events of the creation of the Side Agreement all occurred *before* the foreclosure ever took place that Respondent's so heavily rely on in their opposition, to manufacture the concept that there was "no consideration."

Richard Steir specifically saw value to the Petitioners' third mortgage position and therefore the Side Agreement arose. Had it not been for the Petitioners' new agreement in the "Side Agreement," the "closing of title" may not have been possible. This promise/detriment undertaken by Petitioners led to their new entitlement under the Side Agreement, and the funds for the Side Agreement were not "paid" to them at the closing. Therein lies the Petitioners' injury.

These are all fact issues that were properly, and without objection, submitted to the jury and the trial court's unilateral fact perceptions goes against the grain of American jurisprudence. In essence, the fact finding authority of the

jury was undermined. In *Libutti v. United States*, 178 F.3d 114, 118-119 (2nd Cir. 1999), the Second Circuit stated that, "a trial court should be most reluctant to set aside that which it has previously decided unless convinced that it was based on a mistake of fact or clear error of law...."; see also *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983). Here, New Jersey's grant of JNOV was a routine displacement of the jury's role and this cannot be tolerated in a Seventh Amendment context. *See Worthington v. Bynum*, 305 N.C. 478, 1982) (stating that setting aside a jury verdict tends to diminish the fundamental right to trial by jury in civil cases, guaranteed by the Constitution.)

New Jersey has held that setting aside a jury verdict is permissible when there are erroneous jury instructions, *see Baker v. The Nat. State Bank*, 353 N.J. Super. 145 (2002); citing *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 500 (App. Div. 1994), *certif denied*, 136 N.J. 298 (1994); and that much is hardly debatable. Furthermore, New Jersey has stated that jury verdicts should be set aside in favor of new trial with reluctance, and only when there is clear injustice. *See Goss v. American Cyanamid Co.*, 278 N.J. Super. 227, 239 (App. Div. 1994); and even that much is beyond debatable. However, in our case, New Jersey applied JNOV to a context where no such legal error of any kind occurred, much less cited by Respondents.

As has been stated before, and not disputed in Respondent's opposition brief, the jury instructions were submitted without opposition, and the jury returned a unanimous verdict in favor of Petitioners. The trial court subsequently supplanted its own view of the facts and usurped the *sole and exclusive* function of the jury, which has

far reaching consequences and should be addressed by this Court.

CONCLUSION

For the foregoing reasons, Petitioners Jung Gil Lee and Mi Hae Lee — who have lost everything they possessed when they were lured into making the "Side Agreement," respectfully request that this Court grant review and thereupon *reverse* New Jersey's JNOV and restore the legal jury verdict.

Dated: Englewood, NJ
August 4, 2010

Respectfully submitted,

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